In the Supreme Court of the United States.

OCTOBER TERM, 1898.

JAMES NICOL, APPELLANT,
v.
JOHN AMES, UNITED STATES MARSHAL for the northern district of Illinois. } No. 435.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 4, Original.

EX PARTE: IN THE MATTER OF GEORGE R. NICHOLS, PETITIONER, FOR A WRIT OF HABEAS CORPUS.

BRIEF FOR THE UNITED STATES MARSHAL.

STATEMENT.

QUESTION.

The question raised is the constitutionality of that provision of the act of June 13, 1898 (30 Stat., 448),

known as the "War Revenue Act," which levies a tax "upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery."

In the Nicol case (No. 435), the validity of the requirement that on every sale, or agreement of sale, or agreement to sell, there shall be made and delivered by the seller to the buyer a memorandum thereof, is attacked.

In the Nichols Case (No. 4, Original) the constitutionality of the provision requiring a stamp to be affixed to such memorandum is impugned.

THE LAW.

The following are the material parts of the act, the italics being mine:

ADHESIVE STAMPS.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, *there shall be levied, collected, and paid, for and in respect of the several* bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, *matters, and things mentioned and described in Schedule A of this act*, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, *the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.*

SCHEDULE A.

STAMP TAXES.

[Second paragraph.] *Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered *by the seller to the buyer* a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to *the amount of the tax on such sale*. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not

less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.

THE CASES.

James Nicol, the appellant in No. 435, is and was a citizen of Illinois, and a member of the incorporated commercial exchange known as the Board of Trade of the City of Chicago. On September 2, 1898, in the course of his business on this Board of Trade, Mr. Nicol, by oral contract, sold, for immediate delivery at the city of Chicago, to one James H. Milne, also a citizen of Illinois and a member of the Chicago Board of Trade, two carloads of oats, being 2,289 bushels, then in Chicago, at the price of 20¾ cents per bushel, and for the total sum of $474.98. He sold the oats on the exchange without making and delivering to the buyer any memorandum of the transaction, as required by the War-Revenue Act. For this violation of law an information was filed against him by the United States attorney for the northern district of Illinois, and after trial he was convicted and fined the sum of $500. He refused to pay the fine and, being taken in custody by the marshal, applied to the United States circuit court for a writ of habeas corpus, insisting that the law under which he was convicted and sentenced is unconstitutional. The circuit court held the law constitutional and discharged the writ. (See opinion *Showalter*, D. J., record, p. 20.) From this judgment an appeal was taken to this court.

George R. Nichols, the petitioner in No. 4, Original, is and was also a citizen of Illinois, and a member of the

Board of Trade of Chicago. On October 4, 1898, in the course of his business upon that Board of Trade, he sold for immediate delivery at Chicago to Robert W. Roloson, also a citizen of Illinois and a member of the Board of Trade of Chicago, 10 tierces of hams, weighing 3,000 pounds, at 6½ cents per pound, for the total sum of $195, without affixing to the written memorandum thereof delivered by him to the buyer any revenue stamp. For this an information was filed against him in the United States circuit court and he was tried, convicted, and fined in the sum of $500. Refusing to pay the fine, he was taken in custody by the marshal. To secure his release, he applied to this court for a writ of habeas corpus, insisting that the provision of the War-Revenue Act of 1898, requiring a stamp to be affixed to every memorandum of a sale at a board of trade, is unconstitutional.

ARGUMENT.

I.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

"Every possible presumption," said Mr. Chief Justice Waite, speaking for the court in the *Sinking Fund Cases* (99 U. S., 700, 718), "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the Government can not encroach on the domain of another without danger. The strength of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Powell* v. *Penna.* (127 U. S., 678, 684) the court, speaking by Mr. Justice Harlan, quotes this language with approval, and cites also *Fletcher* v. *Peck* (6 Cranch, 87, 128); *Dartmouth College* v. *Woodward* (4 Wheat., 518, 625); *Livingston* v. *Darlington* (101 U. S., 407).

II.

The Constitution expressly confers upon Congress the taxing power.

The power which Congress exercised in levying the tax now before the court is found in section 8, of Article I, of the Constitution, which reads:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Aside from the requirement of uniformity as to duties, imposts and excises, the only limitations on the power of taxation contained in the Constitution are found in the fourth and fifth clauses of section 9, of Article I, which read:

> No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.
>
> No tax or duty shall be laid on articles exported from any State.

III.

Congress may make all laws which shall be necessary and proper for carrying into execution the foregoing power.

Under the last clause of section 8 of Article I of the Constitution, Congress is given power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. Thus Congress has power to do whatever is necessary, or seems to it necessary, to carry into effect an express power.

In the great case of *McCulloch* v. *Maryland* (4 Wheaton, 316, 421) Mr. Chief Justice Marshall laid down the rule, which has been followed ever since:

> The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.*

IV.

The selection of the means rests with Congress. Unless these means are forbidden by the Constitution, the courts will not interfere.

In the case of *McCulloch* v. *Maryland*, already cited, Mr. Chief Justice Marshall said (p. 423):

> *Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the*

> *Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.*

This language was quoted with approval by Mr. Justice Gray, speaking for the court in the recent case of *Fong Yue Ting* v. *U. S.* (149 U. S., 698, 712), and also by Mr. Justice Harlan, who delivered the opinion of the court in the later case of the *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447, 472), with the following additional language (p. 473):

> It is a settled principle of constitutional law that "the Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." (4 Wheat., 316, 409.) The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It can not go beyond that inquiry without entrenching upon the domain of another department of the Government. That it may not do with safety to our institutions. (*Sinking Fund Cases*, 99 U. S., 700, 718.)

V.

With the exception and under the limitations of the Constitution, the taxing power reaches every subject of taxation.

The power to tax is an essential attribute of sovereignty. Without revenue, no government can exist. Within the limitations fixed by the Constitution, the mode of exercising the taxing power is within the discretion of Congress. The breadth of the taxing power under our Constitution is well described by Mr. Chief Justice Chase, speaking for the court, in the *License Tax Cases* (5 Wall., 462, 471):

> The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

And again by Mr. Justice Swayne, speaking for the court, in *Pacific Insurance Co.* v. *Soule*, 7 Wall., 433, page 443:

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

Speaking of the character and extent of the power of taxation in the States, this court, Mr. Justice Field delivering the opinion, said in the case of the *State Tax on Foreign-held Bonds* (15 Wall., 300, 319):

> The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

VI.

In executing the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in distributing equitably the burdens of Government.

Within the limits fixed by the Constitution, Congress may use its discretion in selecting the subjects of taxation and distributing the burdens of Government. The

greater part of legislation is special; that is, Congress, in dealing with matters before it, exercises the right of classification. The decisions of this court recognize in the fullest and clearest way the right to classify.

In the recent case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283), where the inheritance-tax law of Illinois was assailed on the ground that there was an arbitrary and unconstitutional classification, Mr. Justice McKenna, speaking for the court, discusses elaborately the decisions upon the subject of classification, reaching the conclusion that the provision of the Illinois law levying a graded tax upon inheritances, and for that purpose dividing them into classes according to the value thereof, was not unconstitutional. He concludes with this language (bottom p. 300):

> That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws

and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned.

(See Appendix for other decisions.)

VII.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

In determining whether a taxing law is constitutional or not, it is first necessary to ascertain its operation and effect in the light of the entire act. The form of the act is not the essential thing. In construing a tax law, the court will keep in view the reason of the law, and give the law a construction which will comport with the intention of the enacting power.

Thus, in the *License Tax Cases* (5 Wall., 462), it was conceded that Congress could not grant a license to traffic in liquor within the States, because such authority is vested in the States; yet the Federal law in words provided for the issuance of a license, and made it a misdemeanor to engage in the liquor business without first paying the special tax and obtaining a license. This court upheld the law upon the ground that though the statute called it a license, it was in effect and operation a tax, which Congress had the right to levy upon the liquor business.

VIII.

The tax is upon the sale, agreement of sale, or agreement to sell, not upon the memorandum thereof.

The sixth section of the act provides that the tax shall be levied and collected:

> For and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act.

The subject-matters of taxation are not only bonds, etc., and other documents and instruments, but also "matters and things" described in Schedule A. "Matters and things." More comprehensive words could not be used. The tax shall be levied and collected either for and in respect of the subject-matters above mentioned,

> Or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed, etc.

So the tax is to be levied, according to this section, either "for and in respect of" the matters or things described in Schedule A, or "for or in respect of" the paper upon which they shall be written; that is, the tax shall be levied either upon the transaction or the written memorandum of it. To ascertain upon which, we must turn to Schedule A, which describes the thing taxed. By the express provisions of Schedule A the tax is levied:

> Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange,

> or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent.

The tax, therefore, by the express provisions of Schedule A, is levied upon "each sale, agreement of sale, or agreement to sell." The amount of the tax is regulated by the value of the sale or agreement to sell. The concluding portion of the paragraph of Schedule A relating to this tax simply provides the means for collecting it. It reads:

> That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the *amount of the tax on such sale*.

What follows is a description of the memorandum required and a penalty for making a sale without a memorandum, or delivering a memorandum without the proper stamps affixed. The words which I have italicized in the proviso, "the amount of the tax on such sale," show conclusively the intention of Congress that the tax should be levied on the sale, and not on the memorandum. The memorandum is required for the same reason that Congress requires tobacco to be packed in a certain form, or liquor to be put up in specified packages—for the purpose of making easy the collection of the tax through the purchase and affixing of stamps.

It is suggested that this can not be treated as a tax on sales, because, under the holding in *Cook* v. *Penna.* (97 U. S., 566), a tax on sales would in reality be a tax on the goods sold; and this can not be a tax upon the goods sold because it applies also to agreements to sell for future delivery, in which no goods pass. Without conceding that *Cook* v. *Penna.* holds that in every case a tax on sales is to be held a tax on the commodity sold, I submit that the argument of opposing counsel is really one in favor of the Government's contention. The tax is a tax upon the act of transfer, and not upon the merchandise, because it applies not only to actual sales where merchandise passes, but to sales for future delivery where no merchandise passes. The tax, therefore, is upon the transaction, the contract, or agreement.

IX.

Only those sales, agreements of sale, or agreements to sell, are taxed which are made on a commercial exchange. Such sales are made under conditions which distinguish them from other sales, thus affording a ground for classification. The enormous value of the sales made on exchanges and the facilities there enjoyed in making them, explain the imposition of the tax.

(1) The sales and agreements of sale, and agreements to sell, which are classified for taxation by this act, are those made "at any exchange, or board of trade, or other similar place, either for present or future delivery." The fact of being made at an exchange is sufficient to distinguish them, to set them apart, to segregate them from sales generally. It will not be claimed that there

is or can be any difficulty in identifying these sales and contracts for sales. Surely they are thus far distinguished. But it is averred in the petitions that these sales and contracts for sale made on the Chicago Board of Trade are identical in their character with all other sales and contracts for sales of the same kind of merchandise made in the city of Chicago and elsewhere throughout the United States at other places than on such exchanges, boards of trade, or other similar places. It may be conceded that in a sense the sales and contracts for sales made on an exchange are identical with sales and contracts for sale made elsewhere. But sales made elsewhere are not sales made on an exchange. The parties to the transaction, the seller and buyer, are not subject to the rules which govern commercial exchanges. They do not enjoy the facilities or privileges for trading that a commercial exchange affords. The safeguards thrown by exchanges about the transactions of its members are not present. So you can not say that sales and contracts made outside of an exchange are identical in character with those made on an exchange. In point of fact, the object of creating exchanges is to promote the transaction of business among its members. They enjoy facilities and are afforded a protection in their dealings with one another which outside parties lack. The privileges which come to them through membership are valuable, sometimes exceedingly so. It is unnecessary to particularize. The court will take judicial notice of what a commercial exchange is. In the recent cases of *Anderson et al.* v. *United States* (171 U. S., 604) and *Hopkins et al.* v. *United States* (171 U. S., 578) the

character of an exchange was elaborately discussed before the court. In the Hopkins Case the court considers carefully the character of the Kansas City Live Stock Exchange, which the Government sought to have dissolved as being a combination in restraint of trade in violation of the Anti-Trust Law.

Said the court, speaking by Mr. Justice Peckham, page 587:

> As set forth in the record, the main facts are that the defendants have entered into a voluntary association for the purpose of thereby the better conducting their business, and that after they entered into such association they still continued their individual business in full competition with each other, and that the association itself, as an association, does no business whatever, but is simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; *to maintain and uphold a proper way of doing it; and to create the means for preserving business integrity in the transaction of the business itself.* The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom.

In general terms, this language applies to the Chicago Board of Trade, except that its members are not limited to dealing in live stock. They buy and sell flour, wheat, corn, pork, meats, and other food products. Later, the

following language is used with reference to the facilities afforded by the exchange, page 596:

> The facilities or privileges offered by the defendants are apparent and valuable. The cattle owner has the use of a place for his cattle furnished by the defendants and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners and at the same time the most expeditious and effective.

After describing the facilities afforded by the Kansas City Live Stock Exchange, and showing that charges for such facilities do not amount to a burden upon interstate commerce, the court says that "the services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature" (p. 597). The New York Stock Exchange, the New York Produce Exchange, and the New Orleans Cotton Exchange are taken as illustrations.

The Chicago Board of Trade is a corporation, organized by a special charter, which appears in the Record, No. 435, page 6. For convenience I print this charter as an appendix to my brief. The court will observe that the corporation is authorized to establish such rules, regulations, and by-laws for the management of their business and the mode in which it shall be transacted as they may think proper (section 4). The corporation shall have the right to admit or expel such persons as they may see fit (section 6). The corporation may appoint committees of reference and arbitration and

committees of appeal for the settlement of such matters of difference as may be voluntarily submitted for arbitration by its members. The acting chairman of such a committee is given power to administer oaths and compel the attendance of witnesses (section 7). The award of such a committee may be filed with the clerk of the circuit court and thereupon has the force and effect of a judgment (section 8). The corporation is given power to appoint inspectors to inspect and measure the produce dealt in by the members (section 10).

The Chicago Board of Trade was organized in 1848 and incorporated in 1859. It owns a building which cost $1,800,000. It has about 1,900 members and the initiation fee is $10,000 (Clapp, 301). Its rules and regulations are set out in an appendix to Bisbee & Simonds on Produce Exchanges, pages 303–358. * * *

The Chicago Board of Trade is governed by a board of directors (Bisbee & Simonds, pp. 303, 306), which has power to suspend or expel a member for failing to comply promptly with the terms of any business contract or obligation, or with an award of the arbitration committee; for improper conduct of a personal character in the rooms of the association; for willfully violating any business contract or obligation; for violating any of the rules, regulations, and by-laws of the exchange; for making or reporting any false or fictitious purchases, and for any other dishonorable or dishonest conduct.

Rumors or other information of a grave offense against the good name and dignity of the exchange are required to be promptly investigated, and, if well founded, steps taken to prosecute the offending member. (B. & S., section 15, pp. 310, 311.)

In all hearings before the arbitration committee, the rules are to be construed "as being designed to secure justice and equity in trade." (p. 319.)

Membership is at the will of the board of directors. Visitors are not permitted to negotiate or transact any business in the exchange rooms. (B. & S., p. 323.)

By sections 3 and 4, Rule XV, the "established minimum rates of commission governing members of the association" are prescribed (325, 328). "No rebate, drawback, division of commissions, or any other allowance, directly or indirectly, shall be permitted or excused (328). No member is permitted to do business for a nonmember on a salary" (328). "Any violation or evasion of this rule shall be deemed and held to be an act of bad faith and conduct of so dishonorable a character as to render a member guilty thereof to the severest discipline authorized by the rules of the board of trade" (328). For the first offense the punishment is suspension or expulsion, and for the second the board of directors must expel him." "The name of the party so convicted shall be posted on the bulletin of the exchange" (329). A reward of $500 may be paid for proof of such violation (329).

Rule XX fixes the places and hours for trading, "it being the object and intent of this rule that all such trading which may tend to the maintenance of a public market" shall be thus confined (331).

The regulations for trading are framed in great detail (332–352).

These rules have been many times before the courts of Illinois, Federal and State, and there is no hint or suggestion of their illegality in any of the cases.

In *Roundtree* v. *Smith*, 108 U. S., 269 (1883), the plaintiffs were awarded a judgment for the commis-

sions prescribed by these rules. So, too, in many other cases, the latest being *Hansen* v. *Boyd* (161 U. S., 397). In *Nelson* v. *Board of Trade* (58 Ill., App., 399, 412) the right of this body to prescribe regulations concerning warehouse receipts to be recognized by its members, being the same in principle as the admission of securities by stock exchanges, was recognized. [From Mr. Kranthoff's brief in the Hopkins Case, p. 157.]

(2) I think it sufficiently appears from what I have said that the seller on an exchange enjoys facilities or privileges which the outsider does not. It is in view of these privileges, if not because of them, that this tax is levied. It is on the sale or agreement to sell under special or exceptional conditions that the charge is imposed. The tax is not a tax upon the memorandum, or upon the commodity sold, or upon the occupation of selling; it is not a tax upon the sale or agreement to sell apart from the privilege enjoyed in making the sale on an exchange, but it is upon the sale as made, on an exchange, under the conditions and with the privileges inseparably connected with such sale. The conditions which attach to a sale made on an exchange, the privileges by virtue of which the contract has been consummated, become a part of the transaction and serve to distinguish it and justify the imposition. The contract or agreement which is taxed has become more valuable because it was made on an exchange. The commercial advantages offered by the exchange, the safeguards thrown by the exchange around the transaction, the security which the supervision of the exchange gives that the terms of the agreement will be complied with—all these make the agree-

ment to purchase more valuable than it otherwise would be. The exchange exacts good faith and honorable dealing from its members. The fact of membership is in itself security that the terms of any agreement made by a member on the board will be carried out.

The court will observe that the tax is graduated according to the value of the sale or agreement of sale or agreement to sell. The agreed price controls. The security back of the promise to pay by the buyer is therefore a matter of moment to the seller. He can afford to pay something, not only because of the better market the exchange offers, but because of the guaranty it affords that the price obtained in that market will be paid.

It is insisted that this tax can not be treated as a privilege tax, because the seller on an exchange enjoys no privilege conferred by the Government. The Government gives nothing in the way of a privilege, and therefore can charge nothing in the way of a tax. Certainly this tax can not be regarded as a tax for a privilege conferred by the United States. It is not a privilege tax in that sense. But while not a tax *for* a privilege, it may be regarded as a tax *on* a privilege. A tax may be laid upon a privileged class, not because the Government conferred the privileges, but because it recognizes their existence. In selecting subjects for taxation Congress recognizes existing conditions. A class separated from the rest of the community through the enjoyment of lucrative privileges, from whatever source received, may be selected by Congress for special taxation, not because Congress conferred the privileges, but because through having them

such persons are better able to stand the tax. It is in this way that an equality of burdens is maintained. The changing conditions in business and in society, through continual commercial development, are constantly creating new classes which Congress makes use of in equalizing the burdens of government. This war-revenue act is full of illustrations of this truth.

For instance, the second section imposes certain special taxes. It imposes taxes on bankers, not simply on national banks, which receive certain privileges and franchises from the United States, but on State banks and private banks. The banks are recognized as an existing class, enjoying certain privileges, and therefore able to pay a contribution to the Government.

Paragraph 2 taxes stock brokers; paragraph 3, bond brokers; paragraph 4, commercial brokers; paragraph 5, custom-house brokers. These are occupation taxes, not levied because the Government has a right to regulate these different classes of brokers, but because the business that they are engaged in justifies the exaction of a special contribution.

Paragraph 6 levies a tax on proprietors of theaters, museums, and concert halls; not on all proprietors of such places of amusement, but only upon those in cities having more than 25,000 population. The locality here controls the tax. And yet the tax is uniform, because in all cities having such population the proprietors of such places of amusement must pay the tax. A class is created and the tax is uniform within the class. The Government has no right to regulate theaters, museums, and concert halls, in cities situated in the States. Their

control comes within the police power of the States as exercised usually by the municipalities. Such places, or the proprietors of them, are usually required by the cities to pay a license tax, and this is sustained, partly, at least, by the power to regulate them. Congress, which has no power to regulate them, taxes them simply because it regards them as proper and existing subjects of taxation.

(3) Congress, in this same act, levies an inheritance or succession tax. Such a tax when levied by a State is usually treated as a tax on the privilege of succession, which may be regulated by the State, and therefore enjoyed under such conditions as the State may see fit to impose. (*Magoun* v. *Trust and Savings Bank*, 170 U. S., 283, 288.) The United States does not assume to regulate the descent of property. Its tax can not be sustained, therefore, as the price for a privilege enjoyed at its hands; yet it taxes, and has a right to tax, the privileges thus enjoyed. Though received from the State, it is enjoyed under the protection of the United States, as well as that of the State. The maintenance of the National Government is essential to the preservation of the States, and the protection of the rights of person and property enjoyed by the citizens of the States, who are also citizens of the United States. The members of the Chicago Board of Trade do business in the United States, although they are residents of Chicago. They are protected by the laws of the United States, although they are citizens of Illinois, and the necessity of such protection was never better illustrated than during the great

strike of 1893. Congress taxes the people of the States because the General Government is one formed by the people of the United States, and pledged to provide for their common defense and general welfare. The people, their property, their occupations, their business, their transactions, and acts may all be taxed, because they all exist under the protection of the General Government and receive the benefits flowing from it.

(4) Another thing. The magnitude of the business taxed, the probable profits involved, the amount a trifling imposition will yield when applied to numerous transactions, and the ease with which the tax can be collected, all are things to be considered in selecting and classifying subjects for taxation.

In the present case, sales and agreements to sell on exchanges, whether for present or future delivery, are taxed in part because of the enormous number of such transactions and the magnitude of the sums involved. A sale must be of the value of $100 to be taxed at all, and the tax is only 1 per cent for each $100 in value. Looked at in proportion to the value of the sale, the tax is only one-one hundredth of 1 per cent, an insignificant exaction, yet calculated to yield a considerable revenue in view of the enormous value of all the transactions on such exchanges.

X.

The tax is uniform, because every sale, agreement of sale, or agreement to sell, made at an exchange, is taxed alike. All persons similarly situated are treated the same way and subjected to an equal burden. The tax operates with the same force and effect in every place in the United States where the subject of it is found.

It is contended that this tax must be uniform throughout the United States. I concede this is true. But the uniformity required by the Constitution is a uniformity within the created class. There is such uniformity here. The thing taxed is sales on exchanges. Wherever in the United States there is a sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place, the tax applies. And in such case, the tax applies by a uniform rule, according to the value of the sale, or agreement of sale, or agreement to sell. It is not necessary, in order to insure uniformity in the taxation of sales on exchanges, that every sale shall be taxed, whether made on an exchange or not. The subject-matter of the tax is sales on exchanges, not sales. If every sale on an exchange is taxed by the same rule, there is a uniform tax within the meaning of the Constitution.

This act, in another paragraph in Schedule A, under the heading "Express and freight," contains a provision that every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, which accepts goods for transportation, shall issue to the shipper a bill of lading or

manifest, or evidence of receipt for each shipment; and that a revenue stamp shall be attached to this document and canceled.

Here is a provision evidently designed to apply to the great transportation lines of the country. But in each city and town there are local draymen and expressmen who furnish certain transportation facilities. Because the great common carriers are required to issue bills of lading, to which a stamp must be affixed, it does not follow, in order to give the law a uniform operation, that every man who owns a dray or runs an express wagon must issue a bill of lading or manifest for every trunk or package he hauls. It is not difficult to distinguish transportation by a common carrier from transportation by a common drayman; nor is it difficult to draw the line between a sale on the Chicago Board of Trade and a sale at the village crossroads.

Upon this matter of uniformity, in addition to the cases on classification cited, I refer the court to the opinion delivered by Mr. Justice Miller, speaking for the court, in the *Head Money Cases* (112 U. S., 580, 594).

> The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provision of the Constitution, that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those

> of another," because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all ports alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States. It may be added that the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (*State Railroad Tax Cases*, 92 U.S., 575, 612.) Here there is substantial uniformity within the meaning and purpose of the Constitution.

Also to the language of Mr. Chief Justice Waite, speaking for the court, in the case of *Tappan* v. *Merchants' National Bank* (19 Wall., 490, 504). In this case the validity of a statute of Illinois making separate provision for the taxation of national-bank shares at the place where the bank was located, instead of at the residences of the shareholders, was sustained:

> But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules can not be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph

companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted. The courts permit this.

XI.

There is no interference with the rights of the States to regulate contracts made within their borders. The memorandum is required as a means of collecting the tax. The lack of it does not invalidate the contract.

1. The memorandum is required simply as a means of collecting the tax. It is a very simple document. It must show the date of the sale or contract to sell, the name of the seller, the amount of the sale, and the matter or thing to which it refers. This is all. To this memorandum there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. There is a penalty provided for delivering the merchandise sold without making such memorandum, or for delivering the memorandum without affixing the proper stamp. All these provisions are proper and necessary to collect the tax. Congress does not attempt to regulate contracts made on exchanges so as to dictate what shall be valid and what not. Congress simply provides that a tax shall be levied upon each sale, agreement of sale, or agreement to sell on an exchange, and to collect this tax, requires a memorandum to be made

and a stamp, graduated according to the value of the sale, affixed thereto. I dare say Congress, if it had seen fit, might have adopted other means to collect this tax. The means to be adopted rested within the discretion of Congress. Congress might have required each member of an exchange to report periodically to the collector of internal revenue a detailed statement of his sales, to whom made, with the value thereof. In this way the tax could readily be computed. But such a provision would have been open to the palpable objection that it would require a public disclosure of the business transactions of each member of an exchange. It would have been bitterly contested on such ground, and very properly, too. The present provision is simple and unobjectionable. I venture to say no better means of collecting such a tax can be suggested.

2. In the case of telephone messages, made taxable under Schedule A, a sworn statement is required to be filed with the collector of internal revenue each month, stating the number of messages or conversations transmitted for which a charge of fifteen cents or more was imposed, and for each of such messages the telephone company is required to pay a tax of one cent. Here is a tax on telephone messages and conversations. It would be impossible to reduce the conversations to writing, and so no effort is made to collect the tax by the use of stamps.

(3) In the *License Tax Cases* (5 Wall., 462) the Federal law attacked required liquor dealers to take out a license, paying the United States for the same. A penalty was provided for the failure to take out the license. It was objected that the General Government can not

license the liquor traffic; that power belongs to the States. This court, speaking by Mr. Chief Justice Chase, answered that what Congress could not do the court would not assume it intended to do. The law, therefore, was treated simply as a tax law, the taking out of a license being part of the machinery for the collection of the tax. The following language is used, page 471:

> The power to tax is not questioned, nor the power to impose penalties for nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

So in the present case the requirement that a memorandum shall be made and a stamp affixed is simply a method for collecting the tax.

XII.

The tax is not on personal property or the income thereof. It is therefore not a direct tax. It is a duty on the disposition or transfer of merchandise, which, payable in the first instance by the seller who voluntarily goes upon the exchange, may be shifted, in whole or part, to the buyer. It is therefore an indirect tax—an excise.

It is argued in one breath that this tax must be paid by the seller and can not be shifted to the buyer, and therefore is a direct tax. In the next, it is insisted that a tax on the sale of a commodity is a tax on the commodity itself, and therefore a direct tax.

This is the traditional coon trap, which catches the Government either "comin' or gwine." If the tax can not be shifted it is a direct tax, and if it can be shifted it is a direct tax. If it can not be shifted, and must be paid by the seller, it is a direct tax for that reason alone; if it can be shifted to the buyer, it inevitably falls on the commodity, is added to its price, and for that reason is a direct tax.

The court will have no difficulty in perceiving the fallacy of this double-barreled argument. What a direct tax is, found elaborate discussion in the recent income tax cases (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429; 158 U. S., 601). Before the decision of these cases, the trend of authorities limited the meaning of a direct tax, as used in the Constitution, to a capitation tax and a tax on land. On the original submission of these cases, the court held that a tax on the rents or income of land is a tax on the land itself and therefore a direct tax within the meaning of the Constitution. On the rehearing, the court extended its definition of a direct tax so as to include a tax levied on personal property or the income thereof. Such is the extent to which the court went.

It never thought of holding that every tax that can not be shifted, and therefore must be paid by the person on whom levied, no matter whether based on his occupation or business or transactions, is a direct tax; nor of holding that every tax that can be shifted, and which ultimately falls upon goods or merchandise which have passed through the hands of the taxpayer, is a direct tax.

If opposing counsel are correct, practically every tax levied by the War-Revenue Act can be shown to be a direct tax, and therefore unconstitutional.

It is true that in *Brown* v. *Maryland* (12 Wheaton, 419, 444) it was held that a tax levied by a State on the occupation of an importer was the same as a tax on his imports, and therefore invalid, Mr. Chief Justice Marshall saying:

> It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.

So, in *Almy* v. *California* (24 Howard, 169), it was held that the duty on a bill of lading was the same thing as a duty on the article transported. And in *Cook* v. *Pennsylvania* (97 U. S., 566), it was held that a tax upon the amount of sales of goods made by an auctioneer was, when applied to imported goods, a tax upon the goods sold. The same doctrine has been held in other cases.

But in all these cases the court was endeavoring to ascertain whether a State, in violation of the inhibitions of the Constitution, had laid a burden upon interstate commerce, or had interfered with the exclusive right of the United States to levy duties upon imports. What the court was endeavoring to ascertain was not whether the tax was a direct or indirect tax, within the meaning of the Constitution, but whether the tax, directly or indirectly, operated so as to violate the Constitution. In all

these cases the court was seeking to ascertain the effect of the tax, where the burden would ultimately fall. In *Cook* v. *Pennsylvania*, the court did not hold that a tax on the sale of commodities was a tax on personal property and therefore a direct tax. On the contrary, the court held that a tax on sales was an indirect tax, which ultimately fell on the commodities sold and for that reason operated so as to violate the Constitution.

If the tax on the occupation of an importer, held invalid in *Brown* v. *Maryland*, is to be regarded as a direct tax, "because a tax on the sale of an article, imported only for sale, is a tax on the article itself," then, by the same token, all customs duties laid by the General Government upon articles imported into this country for sale are direct taxes.

Brown v. *Maryland*, and the succeeding cases, cited by opposing counsel, are clearly and tersely distinguished by Mr. Justice White in the dissenting opinion in *Pollock* v. *Farmers' Loan & Trust Co.* (157 U. S., bottom p. 646):

> Nor can I see the application of *Brown* v. *Maryland*, 12 Wheaton, 419; *Weston* v. *Charleston*, 2 Peters, 449; *Dobbins* v. *Erie County Commissioners*, 16 Peters, 435; *Almy* v. *California*, 24 Howard, 169; *Cook* v. *Pennsylvania*, 97 U. S., 566; *Railway Co.* v. *Jackson*, 7 Wall., 262; *Philadelphia, etc., Steamship Co.* v. *Pennsylvania*, 122 U. S., 326; *Laloup* v. *Mobile*, 127 U. S., 640; *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688. All these cases involved the question, whether, under the Constitution, if no power existed to tax at all, either directly or indirectly, *an indirect tax* would be unconstitutional.

Moreover, while this court has held invalid a State tax levied upon the transportation, or receipts, or business of a company engaged in interstate commerce, it has sustained *a direct tax* upon the property, or upon a proportion of the capital stock representing the property, owned or used in a State. Thus, in *Adams Express Co.* v. *Ohio* (165 U. S., 194), the court sustained a State law which levied a tax upon the proportion of the capital stock of the Adams Express Company representing property owned and used in Ohio. Mr. Chief Justice Fuller, speaking for the court, said, page 220:

> Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, can not be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. (*Postal Telegraph Co.* v. *Adams*, 155 U. S., 688.)

And so, in *Brown* v. *Houston*, (114 U. S., 623), a tax on coal transported from Pittsburg to New Orleans, and at the time of the general listing and assessment of

property in New Orleans, held in barges at the wharf, was sustained as a tax on property which had become a part of the mass of property within the jurisdiction of the State.

Turning again to the recent income tax cases, I do not recall any definition of a direct tax, by counsel or by the court, which would include the tax on sales or agreements to sell merchandise at exchanges, which is before the court. Mr. Edmunds argued against the income tax law. He gives the following definition of a direct tax (157 U. S., 491):

> A direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit, or acts, as importing goods which he may import or not import, as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business, and in all of which the burden is to some degree moved on—but in respect of things that belong to the existence of property as an entity—a state of physical being.
>
> Duties, imposts, and excises are, in large degree, and almost universally, heavy or light upon each person, depending upon his own will.
>
> * * * * *
>
> Mr. Justice BROWN. Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.
>
> Mr. EDMUNDS. Yes, sir; that is a much clearer definition than I have given, though I think the

whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement.

In another place (p. 487) Mr. Edmunds speaks of indirect taxes as those "which are intended to fall upon the movement of commodities and the voluntary occupations of men."

In the opinion of the court, Mr. Chief Justice Fuller thus defines direct taxes (157 U. S., 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes.

Mr. Justice Field, in his concurring opinion, thus describes excise taxes (157 U. S., bottom p. 592):

> Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them.

In the opinion on the rehearing, in discussing the meaning of the words "duties, imposts, and excises," used in the Constitution, Mr. Chief Justice Fuller, speaking for the court, says (158 U. S., 622):

> Cooley (on Taxation, p. 3) says that the word "*duty*" ordinarily "means an indirect tax imposed on the importation, exportation or consumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax tribute or duty,

> but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), Mr. Justice Swayne, speaking for the court, adopts the following definition of an excise tax (bottom p. 445):

> Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor. (Citing Bateman's Excise Law, 96; Story's Const., sec. 953; 1 Blackstone's Com., 318.)

(2) A direct tax is one which, under the recent definition of this court, is levied upon property, whether real or personal, or its income. Such a tax can not be escaped. It can not be shifted or moved on. But in the present case it is optional with the owner of any products or merchandise whether he will or will not sell or agree to sell them on an exchange. He goes upon the exchange of his own free will. It is a voluntary act on his part. If he goes there, he goes because it is profitable for him to go. He can get a better market, a better price, or a better contract. The element of free choice thus present is sufficient in itself to make the tax an indirect tax.

In the next place, the tax is upon the transfer of merchandise through an exchange. It is not upon the possession, but the disposition of property. It applies not only to sales where merchandise passes, but to agreements to sell where no merchandise passes, and where

none may pass. The tax is not therefore dependent upon the present ownership of property. Ownership may or may not exist.

(3) I am inclined to agree with Mr. Edmunds, when he said, in the argument in the Income Tax Case, that where an excise is laid upon the movement of commodities, while such tax is an indirect tax, yet the whole burden rarely falls upon the last man. It is borne partly by each agent in the movement. Where a duty is laid upon an imported article, I do not believe that in every instance the importer is obliged to pay the tax, and that he is able to shift the burden in turn to the next purchaser. I believe in some cases the foreign manufacturer, when a duty is laid, is willing to lower his price, so as to bear part of the duty himself. He may be willing to bear all of it in order to retain the market. So with the importer. If he is compelled to pay the duty, he may be able to add it in whole or in part to the price, or he may not. It depends upon the state of the market here and the competition he has to meet. Ordinarily, the duty is added to the price, and is ultimately paid by the consumer.

So in the case before the court. It is impossible in the ultimate analysis to predict with accuracy just where the burden will fall. The circumstances of each particular sale will control. Broadly, it may be stated that in the case of actual sales the tax, being one on the transfer of commodities through an exchange from the producer to the consumer, will be added to the price and ultimately paid by the consumer. But this depends

altogether on whether under the circumstances of the particular transaction the seller on the exchange has found it practicable to shift the tax to the buyer through an increase in the price. It may be that to make the particular sale he finds it to his interest to pay the tax himself. The same observation applies as between the broker and his patron. The law requires the seller to make the memorandum to which the revenue stamp shall be affixed. But it makes it a penalty for any agent or broker for such seller to make the sale or deliver the produce without the memorandum with the stamp affixed. The broker may demand, in addition to his commission, an amount to cover the tax, and he may get this, or he may be willing, in order to secure the patronage, to take care of the tax himself, in which case it comes out of his commission. If the outside dealer is willing to pay the tax in addition to the commission, it is because he thinks the privilege of selling on the exchange is worth that much. On the other hand, if the member pays the tax out of his commission, it is proof that he can afford to divide with the Government.

When we consider the enormous value of transactions on exchanges, where no actual tangible property passes, it will be seen that, to an immense extent, the tax will either be paid by the speculators in wheat, pork, sugar, and cotton, or by the brokers who grow rich from commissions paid by such patrons. Viewed in this light the tax is an especially salutary one.

XIII.

While the right to tax involves the right to destroy, the destruction of all exchanges and boards of trade will not follow inevitably if this tax is sustained.

Counsel for the Chicago Board of Trade is deeply solicitous about its future if this tax is sustained. He says the right to tax involves the right to destroy, and if Congress has a right to tax a transfer of commodities through the exchange, it may tax the exchange out of existence; it may make dealing on the exchange so burdensome that trade will go elsewhere. I suppose the same thing might be said of every subject taxed by the war-revenue act.

If Congress is permitted to levy a tax for $50 on stockbrokers, it may increase the tax to $50,000, and wipe stockbrokers out. In this way the knife would be put to the throat of the New York Stock Exchange.

So, if Congress is allowed to tax commercial brokers $20, it may tax each one $20,000, and this would just as effectually put an end to every produce, or live stock, or cotton exchange.

So, if Congress can tax manufacturers and dealers in tobacco, it can destroy the tobacco industry; if it can tax manufacturers and dealers in liquor and beer, it can wipe out the liquor trade and the breweries.

If it can tax telegraph and telephone messages, it can destroy the great sources of communication in this country.

If it can tax every shipment of freight on a railroad, it can make the transportation of freight so onerous as to

destroy all the great lines of transportation. And so on ad libitum.

It will be time enough for the produce exchanges and boards of trade to cry out when they are hurt.

XIV.

The tax on sales on exchanges is not a novel one. The act of 1864 practically levied such a tax.

The act of June 30, 1864 (13 Stat., 233), to provide internal revenue to support the Government, provided in section 99 (p. 273):

> That all brokers, and bankers doing business as brokers, shall be subject to pay the following duties and rates of duty upon the sales of merchandise, produce, gold and silver bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds, or other securities, etc.

The tax upon all sales of merchandise, produce, or other goods was one-eighth of 1 per cent.

It is to be noted that the tax on sales of merchandise by brokers was in addition to the license tax of $20 on commercial brokers. (See section 79, paragraph 14, p. 253.)

In *United States* v. *Cutting* (3 Wall., 441), the provision of section 99, as amended in 1865, came before the court in connection with that section of the act which requires brokers to take out a license. The court held that a licensed stock broker must pay a tax on the sale of stocks, bonds, and securities made by himself, as well as on those made for others. The case was argued by Messrs. Allen, Burrill, and Evarts for the stock brokers against the

Government, but the validity of the act was never questioned. It seems never to have suggested itself to these able lawyers that a tax on sales made by a broker who had paid a license would amount to double taxation or otherwise violate the Constitution.

In *Warren* v. *Shook* (91 U. S., 704) it was held that a banker doing business as a broker was subject, under the revenue act of 1864, to pay the tax or duty upon sales, Mr. Justice Hunt, speaking for the court, saying, bottom page 711:

> The intent of Congress to subject to taxation all sales made by those engaged in the business of brokers is plain enough. When it was said (sec. 99) "that all brokers and bankers doing business as brokers shall be subject" to the duties specified, it was intended to encompass the entire class of persons engaged in the business of buying and selling stocks and coin.

CONCLUSION.

I concede that the question involved in these cases is an important one. It may be true, as Mr. Robbins says (brief, p. 62), that "unfortunately the inequalities of life are daily becoming more marked." From this he concludes that Congress should daily be less trusted, and that the court should strain a point to tie the hands of Congress and forestall legislation which he apprehends such inequalities may invite. He forgets that this tax was levied, not in a spirit of envy to even up with the fortunate in this world's goods, but in a spirit of patriotism to meet the emergency occasioned by a foreign war.

The Government is interested, not in keeping "an open door" through which to get at the "classes" in order to curry favor with the "masses," but in saving intact the sources of revenue, which have been available in the past, are needed now, and may be essential in the future to preserve and defend the Government itself.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX A.

Cases on the right to classify.

In *Barbier* v. *Connolly* (113 U. S., 31), (a case in which an ordinance of San Francisco prohibiting work in public laundries at night was sustained) the court, speaking by Mr. Justice Field, says, respecting the scope of the fourteenth amendment, that it was undoubtedly intended, by the adoption of that amendment, to provide—

> That equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * That no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

As applied to taxation, this interpretation has been repeatedly affirmed.

In *Bell's Gap R. R. Co.* v. *Penna.* (134 U. S., 232, 234), the tax on moneyed securities sustained, was assailed on the ground that there was a discriminating classification. The court held that as the law applied to

all corporate securities there was no discrimination. Mr. Justice Bradley delivered the opinion. On page 237, he says that the provision in the fourteenth amendment "was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways." Then he cites the various ways in which property may be classified, and says: "We think that we are safe in saying, that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation." Such a construction, he says, "would render nugatory those discriminations which the best interests of society require." He cites *Barbier* v. *Connolly*.

In *Home Insurance Co.* v. *New York* (134 U. S., 594), a tax imposed by the State of New York upon the corporate franchise or business of all corporations, whether foreign or domestic, doing business within the State, to be measured by the extent of the dividends of the current year, was sustained as a tax upon the privilege of being an incorporation, and doing business within the State in a corporate capacity, and not a tax upon the privilege or franchise, which, when incorporated, the company may exercise. Therefore, its imposition upon dividends did not violate the law exempting United States bonds from taxation, although a portion of the dividends were derived from interest on capital invested in such bonds. It was claimed there was discriminating classification, depriving corporations affected of the equal protection of the laws. As to this, Mr. Justice Field, speaking for the court, says, bottom page 606:

> The amendment does not prevent the classification of property for taxation—subjecting one kind of

> property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected.

In *Pacific Express Co.* v. *Seibert* (142 U. S., 339), in which a tax on gross receipts of express companies was sustained, the court, by Mr. Justice Lamar, says, page 351:

> This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens.

In *Railroad Co.* v. *Gibbs* (142 U. S., 386), it was held that a law which assessed on railroads in South Carolina the expense of a State railroad commission, thus classifying railroads for the purpose of imposing on them a

specific burden, did not violate the guaranty of equal protection of the laws.

In *Missouri Pacific R. R. Co.* v. *Humes* (115 U. S., 512), a Missouri law imposing double damages on a railroad corporation for injury resulting from a neglect to fence its road, was sustained, Mr. Justice FIELD saying, for the court, bottom page 523:

> The statute makes no discrimination against any railroad company in its requirements. * * * There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

In *Missouri Ruy. Co.* v. *Mackey* (127 U. S., 205), a Kansas statute making railroad companies liable for injuries to employees resulting from the negligence of their fellow-servants, was sustained. Mr. Justice FIELD, in delivering the opinion of the court, says, page 209:

> The greater part of all legislation is special, either in the objects sought to be obtained by it or in the extent of its application. * * * When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.

In *Kentucky R. R. Tax Cases* (115 U. S., 321), Mr. Justice MATTHEWS, speaking for the court, says, middle page 337:

> The rule of equality, in respect to the subject, only requires the same means and methods to be applied

impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the method and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect, which the discretion of the legislature has seen fit to impose.

See, also, bottom page 338, citing *Missouri* v. *Lewis* (101 U. S., 22, 30).

The following cases sustained laws assailed on the ground that they provided for unjust discrimination through classification:

Horn Silver Mining Co. v. *New York*, 143 U. S., 205 (Heavier tax on foreign than domestic corporations, held good.)

Munn v. *Illinois*, 94 U. S., 113. (Charge on elevators in Chicago to exclusion of other elevators in Illinois, sustained.)

Budd v. *New York*, 143 U. S., 517. (Law regulating elevator charges in cities having population of over 130,000, sustained.)

Missouri v. *Lewis*, 101 U. S., 22. (Special judicial provisions for particular localities of a State, sustained.)

Soon hing v. *Crowley*, 113 U. S., 703. (San Francisco ordinance prohibiting work in public laundries at night, sustained.)

Wurtz v. *Hoagland*, 114 U. S., 606. (Special New Jersey law regulating assessment for drainage purposes, sustained.)

Watson v. *Nevin*, 128 U. S., 578. (Kentucky law regulating assessment for street improvement in Louisville, sustained.)

Minneapolis v. *Beckwith*, 129 U. S., 26. (Iowa act authorizing recovery double the value of stock killed, through neglect to fence, sustained.)

C. & M. W. Ry. Co. v. *McLaughlin*, 119 U. S., 566.

Hayes v. *Missouri*, 120 U. S., 68. (Special jury law for certain cities in Missouri, sustained.)

Dow v. *Beidelman*, 125 U. S., 680. (Arkansas law classifying railroads according to length, and regulating passenger charges, sustained.)

APPENDIX B.

Charter of Chicago Board of Trade.

Be it enacted by the people of the State of Illinois, represented in the General Assembly:

SECTION 1. That the persons now composing the board of trade of the city of Chicago, are hereby created a body politic and corporate, under the name and style of "The Board of Trade of the City of Chicago," and by that name may sue and be sued, implead and be impleaded, receive and hold property and effects, real and personal, by gift, devise or purchase, and dispose of the same by sale, lease, or otherwise (said property so held not to exceed at any time the sum of two hundred thousand dollars) may have a common seal, and alter the same from time to time; and make such rules, regulations, and by-laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

SEC. 2. That the rules, regulations and by-laws of the said existing board of trade shall be the rules and by-laws of the corporation hereby created, until the same shall be regularly repealed or altered; and that the present officers of said association known as the "Board of Trade of the City of Chicago," shall be the officers of the corporation hereby created, until their respective offices shall regularly expire or be vacated, or until the election of new officers according to the provisions hereof.

SEC. 3. The officers shall consist of a president, one or more vice-presidents, and such other officers as may be determined upon by the rules, regulations, or the by-laws of said corporation. All of said officers shall respectively hold their offices for the length of time fixed upon by the rules and regulations of said corporation hereby

created, and until their successors are elected and qualified.

SEC. 4. That said corporation is hereby authorized to establish such rules, regulations and by-laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

SEC. 5. The time and manner of holding elections and making appointments of such officers as are not elected, shall be established by the rules, regulations and by-laws of said corporation.

SEC. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof.

SEC. 7. Said corporation may constitute and appoint committees of reference and arbitration and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the association, or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses and issue subpœnas and attachments compelling the attendance of witnesses the same as justices of the peace, and in like manner directed to any constable to execute.

SEC. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the rules or by-laws, then, on filing such award and submission with the clerk of the circuit court, an execution may issue upon such award as if it were a judgment rendered in the circuit court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court.

SEC. 9. It shall be lawful for said corporation, when they shall think proper, to receive and require of and

from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts, and the president or secretary is hereby authorized to administer such oaths of office as may be prescribed in the by-laws or rules of said corporation. Said bonds shall be made payable and conditioned as prescribed by the rules or by-laws of said corporation, and may be sued and the moneys collected and held for the use of the party injured, or such other use as may be determined upon by said corporation.

SEC. 10. Said corporation shall have power to appoint one or more persons, as they may see fit, to examine, measure, weigh, gauge, or inspect flour, grain, provisions, liquor, lumber, or any other articles of produce or traffic commonly dealt in by the members of said corporation; and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such article, shall be evidence between buyer and seller of the quantity, grade or quality of the same, and shall be binding upon the members of said corporation or others interested, and requiring or assenting to the employment of such weighers, measurers, gaugers, or inspectors; nothing herein contained, however, shall compel the employment, by anyone, of any such appointee.

SEC. 11. Said corporation may inflict fines upon any of its members and collect the same, for breach of its rules, regulations or by-laws; but no fine shall exceed five dollars. Such fines may be collected by action of debt, before a justice of the peace, in the name of the corporation.

SEC. 12. Said corporation shall have no power or authority to do or carry on any business, excepting such as is usual in the management of boards of trade or chambers of commerce or as provided in the foregoing sections of this bill.